Sabah Development Bank Bhd v Petron Oil (M) Sdn Bhd

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO S-02(NCVC)(W)-1430–08 OF 2016
ABDUL RAHMAN SEBLI, KAMARDIN HASHIM AND HARMINDER SINGH JJCA
2 JANUARY 2019

Contract — Assignment — Absolute assignment — Contract proceeds assigned to appellant — Whether appellant held money as constructive trustee for benefit of respondent notwithstanding that money had been lawfully and absolutely assigned to appellant

Equity — Equitable remedies and reliefs — Constructive trust — Constructive trustee — Contract proceeds assigned to appellant — Whether appellant held money from contract proceeds as constructive trustee for benefit of respondent

Trusts and Trustees — Trustees — Constructive trustee — Contract proceeds assigned to appellant — Whether appellant held money from contract proceeds as constructive trustee for benefit of respondent

This was an appeal from the decision of the learned High Court judge who based on the factual matrix of the case, decided that there existed a constructive trust between Sabah Development Bank Bhd ('the appellant') and Petron Oil (M) Sdn Bhd ('the respondent'). Swakaya Sdn Bhd ('Swakaya') was awarded a contract by Sabah Electricity Sdn Bhd ('SESB') to supply and deliver diesel to its power station. To finance and carry out this contract, Swakaya applied to the appellant for banking facilities, which the appellant had granted a total of two banking facilities to Swakaya amounting to a sum of RM85m. As security for the banking facilities, Swakaya had absolutely assigned all contract proceeds via an assignment of contract proceeds from the contract to the appellant. Proceeds of the contract were initially paid into a Maybank account which was owned by Swakaya but the appellant's managers and officers were appointed as the authorised signatories. The appellant would utilise all of the contract proceeds paid into the Maybank account to reduce the RM85m debt owed by Swakaya to the appellant. The Maybank project account was subsequently frozen by MACC. Swakaya then agreed to open a second account with CIMB Bank Bhd, which was opened in November 2013. The appellant then notified SESB of the new account and requested that the proceeds of the contract be paid into the CIMB account. Swakaya had also notified SESB of the assignment of contract proceeds and instructed SESB to remit all contract

proceeds into the CIMB account. The respondent was engaged by Swakaya to supply diesel to SESB, and Swakaya had requested that the respondent supply and deliver the diesel directly to SESB. Swakaya also consented to SESB making direct payment to the respondent. This agreement was confirmed by a letter dated 15 November 2013 between Swakaya and the respondent. The respondent's claim was for the sum of RM24,835,281.62 being the amount of monies owed for the diesel supplied and delivered to SESB. The respondent submitted that the appellant had wrongfully withdrawn the said sum to settle part of the credit facilities the appellant had granted to Swakaya as the appellant held the sum as a trustee or constructive trustee on behalf of the respondent. In defence, the appellant submitted that the assignment of the contract proceeds in its favour by Swakaya was a legal and valid assignment as the assignment satisfied the requirements of a legal assignment under s 4(3) of the Civil Law Act 1956 that: (a) it was an absolute assignment; (b) it was in writing; and (c) express notice was given to the person from whom the assignor would be entitle to receive the 'chose in action'.

Held, dismissing the appeal with costs of RM15,000 subject to payment of the allocator fee:

(1) There could be no argument that the CIMB project account was opened for the specific purpose of making payment to the respondent for the diesel fuel that it supplied and delivered to SESB. In fact, both Swakaya and SESB agreed that the said sum belonged to the respondent. It was clear that the appellant had received the said sum from SESB as a constructive trustee for the benefit of the respondent. Therefore, it was the appellant's duty to return the money to its rightful owner ie the respondent. It was contrary to good conscience for the appellant to retain and use the money for its own benefit, notwithstanding the fact that the money had been lawfully and absolutely assigned to it by Swakaya (see paras 50 & 59).

[Bahasa Malaysia summary

Ini merupakan rayuan daripada keputusan hakim Mahkamah Tinggi yang terpelajar yang telah, berdasarkan matriks fakta kes, memutuskan bahawa wujud satu amanah konstruktif di antara Sabah Development Bank Bhd ('perayu') dan Petron Oil (M) Sdn Bhd ('responden'). Swakaya Sdn Bhd ('Swakaya') telah dianugerahkan satu kontrak oleh Sabah Electricity Sdn Bhd ('SESB') untuk membekal dan menghantar diesel kepada stesen janakuasa elektriknya. Untuk membiayai kontrak ini, Swakaya memohon kepada perayu untuk fasiliti perbankan, yang mana perayu telah membenarkan dua fasiliti perbankan yang terjumlah kepada RM85 juta. Sebagai cagaran kepada fasiliti perbankan tersebut, Swakaya telah menyerahkan secara mutlak semua hasil kontrak melalui kontrak penyerahan hasil dari kontrak kepada perayu. Hasil kontrak tersebut pada mulanya dibayar kepada akaun Maybank yang dimiliki

Swakaya, tetapi pengurus dan pegawai perayu dilantik sebagai penandatangan yang diberikuasa. Perayu akan menggunakan kesemua hasil kontrak yang dibayar ke dalam akaun Maybank tersebut untuk mengurangkan hutang RM85 juta oleh Swakaya kepada perayu. Akaun projek Maybank tersebut kemudiannya dibeku oleh SPRM. Swakaya kemudiannya bersetuju untuk membuka akaun kedua dengan CIMB Bank Bhd, yang dibuka pada November 2013. Perayu kemudiannya memaklumkan SESB akan akaun baru tersebut dan memohon agar hasil kontrak dibayar kedalam akaun CIMB tersebut. Swakaya juga memaklumkan SESB berkenaan dengan penyerahan hasil kontrak dan mengarahkan SESB untuk meremit semua hasil kontrak kedalam akaun CIMB tersebut. Responden telah dilantik oleh Swakaya untuk membekalkan diesel kepada SESB, dan Swakaya telaah meminta agar responden membekalkan dan menghantar diesel secara terus kepada SESB. Swakaya juga mengizinkan SESB untuk membuat pembayaran secara terus kepada responden. Perjanjian in disahkan melalui satu surat bertarikh 15 November 2013 antara Swakaya dan responden. Tuntutan responden adalah untuk sejumlah RM24,835,281.62 yang merupakan jumlah wang yang perlu dibayar untuk diesel yang dibekalkan dan dihantar kepada SESB. Responden berhujah bahawa perayu telah secara salah mengeluarkan jumlah wang tersebut untuk melangsaikan sebahagian daripada fasiliti kredit yang perayu telah berikan kepada Swakaya, kerana perayu memegang jumlah tersebut sebagai pemegang amanah atau pemegang amanah konstruktif bagi pihak responden. Sewaktu pembelaan, perayu menghujahkan bahawa penyerahan hasil kontrak yang memihak kepadanya oleh Swakaya adalah satu penyerahan yang sah dan betul disisi undang-undang kerana penyerahan tersebut memenuhi keperluan penyerahan undang-undang di bawah s 4(3) Akta Undang-Undang Sivil 1956 bahawa: (a) ianya merupakan satu penyerahan mutlak; (b) ianya bertulis; dan (c) notis nyata telah diberikan kepada individu dari mana penyerah hak berhak untuk menerima hak dalam tindakan.

Diputuskan, mengetepikan rayuan dengan kos RM15,000 tertakluk kepada bayaran yuran alokatur:

(1) Tidak boleh wujud sebarang hujahan bahawa akaun projek CIMB dibuka untuk tujuan spesifik untuk membuat bayaran kepada responden untuk minyak diesel yang dibekalkan dan dihantar kepada SESB. Adalah merupakan fakta bahawa Swakaya dan SESB bersetuju bahawa jumlah tersebut adalah milik responden. Adalah jelas bahawa perayu telah menerima jumlah tersebut daripada SESB sebagai pemegang amanah konstruktif untuk faedah responden. Oleh yang demikian, adalah menjadi tanggungjawab perayu untuk memulangkan wang tersebut kepada pemilik sebenarnya iaitu responden. Adalah tidak selaras dengan kemurnian untuk perayu memegang dan menggunakan wang tersebut untuk keuntungan sendiri, meskipun fakta bahawa wang tersebut telah

secara sah dan secara mutlak diserah hak kepadanya (lihat perenggan 50 & 59).]

Notes

For cases on absolute assignment, see 3(2) *Mallal's Digest* (5th Ed, 2018 Reissue) paras 3599–3607.

For cases on constructive trust, see 6(3) *Mallal's Digest* (5th Ed, 2015) paras 2958–2962.

For cases on constructive trustee, see 12(2) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 3505–3507.

Cases referred to

Bank of Credit and Commerce International (Overseas) Ltd (in liquidation) and another v Akindele [2000] 4 All ER 221, CA (refd)

Beatty v Guggenheim Exploration Co (1919) 225 NY 380; 122 NE 378, CA (refd)

Chempro Technology (M) Sdn Bhd v Wee Eng Hock & 2 Ors (Kuala Lumpur Civil Suit No D1–22–93 of 2008) (unreported) (refd)

Damai Freight (M) Sdn Bhd v Affin Bank Bhd [2015] 4 MLJ 149; [2015] 4 CLJ 1, FC (refd)

Ferguson v Owen 9 Ohio St 3d 223 (Ohio 1984); 9 Ohio St 3d 223; 459 NE 2d 1293, SC (refd)

Geh Cheng Hooi & Ors v Equipment Dynamics Sdn Bhd and other appeals [1991] 1 MLJ 293, SC (refd)

Montagu's Settlement Trusts, Re; Duke of Manchester v National Westminster Bank Ltd and others [1992] 4 All ER 308, Ch D (refd)

Paragon Finance plc v D B Thakerar & Co (a firm); Paragon Finance plc and another v Thimbleby & Co (a firm) [1999] 1 All ER 400, CA (refd)

Public Finance Bhd v Scotch Leasing Sdn Bhd (in receivership) (Perwira Habib Bank Malaysia, intervener) [1996] 2 MLJ 369; [1996] 3 CLJ 635, FC (refd)

Qimonda Malaysia Sdn Bhd (in liquidation) v Sediabena Sdn Bhd & Anor [2012] 3 MLJ 422, CA (refd)

Takako Sakao (f) v Ng Pek Yuen (f) & Anor [2009] 6 MLJ 751, FC (refd)

Tan Sri Dato' (Dr) Rozali Ismail & Ors v Chua Lay Kim (P) & Ors [2015] MLJU 2111; [2016] 3 CLJ 84, CA (refd)

Tay Choo Foo @ Tay Chiew Foo v Tengku Mohd Saad @ Tengku Arifaad bin Tengku Mansur & Ors (all acting as administrators of the estate of Tunku Mansur bin Tunku Yaacob, deceased) and another appeal [2009] 1 MLJ 289; [2009] 2 CLJ 363, CA (refd)

Tudingan Timur Sdn Bhd v Che Mat bin Padali (Civil Appeal No A-02–1613 of 2011) (unreported) (refd)

Legislation referred to

Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001
Civil Law Act 1956 s 4(3)
National Land Code s 433B

Appeal from: Suit No BKI-22NCVC-98/11–2014(HC2) of 2014 (High Court, Kota Kinabalu)

Saiful Azian bin Mokhtar (Jayasuriya Kah & Co) for the appellant.
Connie Willie (Lind, Willie Wong & Chin) for the respondent.

Abdul Rahman Sebli JCA (delivering judgment of the court):

[1] This appeal concerns the creation of a constructive trust. The facts are as follows. Swakaya Sdn Bhd ('Swakaya'), a company incorporated in Malaysia was awarded a contract by Sabah Electricity Sdn Bhd ('SESB') to supply and deliver diesel fuel to its power stations. The contract sum was RM506,952,888.75. We shall refer to the contract as 'the SESB contract'.

[2] The respondent, Petron Oil (M) Sdn Bhd ('Petron') is a private limited company engaged in the business of supplying petroleum and petroleum related products. Petron sued Swakaya for the sum of RM24,835,281.62, which was the balance owed by Swakaya for the diesel fuel that it had supplied and delivered to SESB in accordance with the SESB contract, and judgment had been entered against Swakaya for the said sum. Swakaya was not a party to this appeal.

[3] In order to finance and carry out the SESB contract, Swakaya applied for and was granted two banking facilities by the appellant, Sabah Development Bank Bhd ('SDBB') on terms and conditions set out in the letter of offer dated 12 March 2013 and credit facilities agreement dated 3 April 2013 (for the initial RM50m) and the letter of offer dated 3 April 2013 and credit facilities agreement dated 23 August 2013 (for the additional RM35m).

[4] As security for the RM50m banking facilities granted by SDBB, Swakaya by an assignment of contract proceeds dated 3 April 2013 absolutely assigned all the contract proceeds from the SESB contract to SDBB. The assignment was expressed to be absolute.

[5] Written notice of the assignment dated 20 March 2013 was given to SESB, and Swakaya irrevocably instructed SESB to remit all contract proceeds from the SESB contract to a project account with Malayan Banking Bhd, Kota Kinabalu ('the Maybank project account').

[6] By a reply letter dated 22 March 2013, SESB acknowledged receipt of the notice of assignment and agreed to the said assignment and instructions contained therein.

[7] As security for the payment of an additional RM35m banking facilities granted by SDBB, Swakaya executed a supplemental assignment of contract proceeds dated 23 August 2013. This assignment was also expressed to be absolute.

[8] SDBB's managers and officer(s) were appointed as the authorised signatories of the Maybank project account, even though the account was under the name of Swakaya.

[9] It was the testimony of SDBB's witnesses at the trial that SDBB would utilise all of the contract proceeds paid by SESB into the Maybank project account to reduce the RM85m (RM50m + RM35m) debt owing by Swakaya to SDBB. Petron however disputed that the contract proceeds could be used for that purpose.

[10] Sometime in October 2013, the Maybank project account was frozen by the Malaysian Anti Corruption Agency ('MACC') under the Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001. We were not told of the reason why the account was frozen by the MACC.

[11] After the Maybank project account was frozen by the MACC, SDBB could no longer withdraw monies from the account and utilise it for reducing Swakaya's RM85m loan. As a result, Swakaya agreed to open a second account with CIMB Bank Bhd ('the CIMB project account') which was to be utilised for the same purpose, ie for receiving payment of the SESB contract proceeds in place of the Maybank project account which had been frozen.

[12] The CIMB project account was opened sometime in November 2013 but SDBB's officer and managers were only appointed as the authorised signatories of the account sometime in March 2014.

[13] By letter dated 20 November 2013, SDBB notified SESB of the new CIMB project account and also requested that all contract proceeds from the SESB contract were to be remitted to the CIMB project account.

[14] By a second undated notice, Swakaya notified SESB of the assignment of contract proceeds and instructed SESB to remit all contract proceeds from the SESB contract to the CIMB project account.

[15] SESB had acknowledged receipt of the second notice and consented to the said assignment and instructions contained therein. Thereafter, payment of the SESB contract proceeds were paid by SESB into the CIMB project account.

[16] It was common ground that Swakaya had requested Petron to supply and deliver the diesel fuel directly to SESB, and Swakaya consented to SESB making direct payment to Petron. This arrangement was confirmed by a letter dated 15 November 2013 signed by Swakaya and Petron but not by SESB.

[17] Petron had been paid in full for the diesel fuel that it supplied and delivered to SESB for the month of November 2013. Payment was made from the CIMB project account. SESB had made payment of RM12,977,480.11 into the CIMB project account and Petron had received in full the sum of RM12,977,480.11 for the November 2013 deliveries by way of remittance from the CIMB project account.

[18] SDBB believed that these payments were made before it's officer and managers were appointed as the authorised signatories of the CIMB project account sometime in March 2014. According to SDBB, the payments made by Swakaya to Petron by utilising the CIMB project account were made without its knowledge or consent.

[19] Meanwhile, Petron continued to supply and deliver directly to SESB RM50,094,713.79 worth of diesel and SESB had fully paid the sum by remitting payment into the CIMB project account. In total, Petron had been paid a sum of RM26,017,121.95 by SESB via the CIMB project account but RM24,835,281.62 remained unpaid. Petron's suit against Swakaya was for this outstanding sum of RM24,835,281.62 in respect of which, as we mentioned earlier, judgment had been entered against Swakaya.

[20] Petron's suit against SDBB on the other hand was on the ground that despite knowing that the said sum of RM24,835,281.62 was payment made by SESB for the diesel fuel supplied and delivered to SESB by Petron, SDBB proceeded to wrongfully withdraw the said sum to settle part of the credit facilities it granted to Swakaya.

[21] It was Petron's pleaded case that both Swakaya and SDBB were not entitled to withdraw the said sum of RM24,835,281.62 from the CIMB project account and by doing so, they had unjustly enriched themselves at the expense of Petron. Petron's case was that SDBB held the RM24,835,281.62 as 'trustee' or 'constructive trustee'.

[22] Given the nature of the dispute between Petron and SDBB, the issue

before the learned High Court judge was whether SDBB held the monies in the CIMB project account on trust for Petron. After a full trial, the learned judge found in favour of Petron, hence the present appeal, which we dismissed by a unanimous decision after hearing arguments by both sides. We found no merit in the appeal.

[23] Section 3.1 of the assignment of contract proceeds dated 3 April 2013 that Swakaya granted in favour of SDBB provides as follows:

> ... the Assignor as beneficial owner HEREBY ASSIGNS absolutely to the Assignee all of the Contract Sum to which the Assignor is or may be entitled.

[24] Similarly, section 3.1 of the supplemental assignment of contract proceeds dated 23 August 2013 provides:

> ... the Assignor as beneficial owner HEREBY ASSIGNS absolutely to the Assignee all of the Contract Sum to which the Assignor is or may be entitled.

[25] SDBB's defence to Petron's claim was that the assignment of the SESB contract proceeds in its favour by Swakaya was a legal and valid assignment as the assignment satisfied the requirements of a legal assignment under s 4(3) of the Civil Law Act 1956 in that:

(a) it was an absolute assignment;

(b) it was in writing; and

(c) express notice was given to the person from whom the assignor would be entitled to receive the 'chose in action'.

[26] *Mozley & Whiteley's Law Dictionary* (19th Ed) defines a 'chose in action' as 'a thing of which a person has not the present enjoyment, but merely a right to recover it (if withheld) by action'.

[27] The chose in action in the present case is the SESB contract proceeds in the sum of RM24,835,281.62. In *Damai Freight (M) Sdn Bhd v Affin Bank Bhd* [2015] 4 MLJ 149; [2015] 4 CLJ 1 the Federal Court explained the legal effect of an absolute assignment as follows:

> [25] In the present case, the assignment document is the LACA, in which cl 7(1) therein states that the appellant, as the borrower, 'absolutely assigns to the bank the lease of the said Land and the full and entire benefit of the Principal Agreement together with the rights, title and interest of the Borrower therein'. In this regard, the use of the words 'absolutely assigns' in the provision of the LACA clearly demonstrates that the instrument was intended by the parties to be an absolute assignment and not one by way of a charge only (see *Hipparion (M) Sdn Bhd v Chung Khiaw Bank Ltd* [1989] 2 MLJ 149 (SC)). The law in relation to absolute assignment is an equitable mortgage and the essence of a mortgage is that there is a

transfer of the ownership of a chose in action, not the land, to the mortgagee (see *Bupinder Singh and Chuah Eng Khong*). A

[28] On the strength of this Federal Court authority, SDBB submitted that the effect of the absolute assignment was that there was a valid transfer of the right in the chose in action to SDBB, ie a transfer of the RM24,835,281.62 SESB contract proceeds by Swakaya to SDBB. B

[29] It was submitted that by reason of the absolute assignment of contract proceeds dated 3 April 2013 and the supplemental assignment of contract proceeds dated 23 August 2013, SDBB was legally entitled to the RM24,835,281.62 that SESB remitted into the CIMB project account. C

[30] What the argument amounts to is this. Since the RM24,835,281.62 had been absolutely assigned to SDBB by Swakaya, the money now belonged to SDBB absolutely, never mind that the money was meant as payment for Petron's sale of diesel fuel to SESB. D

[31] SDBB's contention was that it had better rights than Petron and even Swakaya over the RM24,835,281.62, and that it was lawfully entitled to keep and utilise the money for its own benefit, in this case to settle the amount owing by Swakaya under the RM85m banking facilities. E

[32] In support of his argument that SDBB was the real owner and had absolute right over the SESB contract proceeds of RM24,835,281.62, learned counsel cited *Public Finance Bhd v Scotch Leasing Sdn Bhd (in receivership) (Perwira Habib Bank Malaysia, intervener)* [1996] 2 MLJ 369; [1996] 3 CLJ 635 where the Federal Court held as follows at p 379 (MLJ); p 647 (CLJ): F

> Subject to statutory intervention and modifications, all kinds of personal property are subject to the *nemo dat* rule from which flows the consequence that nobody can claim any personal property against the real owner of that personal property. G

[33] It was submitted that in allowing Petron's claim, the learned trial judge committed two serious errors of law, firstly in failing to consider the legal effect or consequence of the assignment of contract proceeds and secondly, in failing to appreciate that the SESB contract proceeds had been lawfully and absolutely assigned to SDBB. It was submitted that the second error alone was good enough reason to allow this appeal. H

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[34] We need to point out that it is not entirely true that the learned trial judge failed to appreciate that the SESB contract proceeds had been lawfully assigned to SDBB. He did in fact address his mind to the assignment when he said at p 8 of his grounds of judgment:

A In any event, as rightly submitted by learned counsel for the second defendant, the second defendant claimed that they were legally entitled to receive the SESB contract proceeds by reason of the assignment in favour of the second defendant and it cause grave injustice to the second defendant as the second defendant is in law entitled to receive the SESB contract proceeds as the lawful assignee of those B contract proceeds.

[35] To reiterate, Petron's case was that the RM24,835,281.62 that SESB remitted into the CIMB project account belonged to Petron and as such was money held on trust by SDBB for Petron. It was submitted that since it was C trust money, it was unconscionable for SDBB to retain and utilise the money for repayment of Swakaya's loan facilities with SDBB.

[36] SDBB's contention on the other hand was that Petron's claim must fail as it had not succeeded in discharging its burden of proving that SESB had D agreed to make direct payment to it for the supply and delivery of the diesel fuel.

[37] It was pointed out that Petron's pleaded case in essence was that because E of the tripartite agreement between Petron, Swakaya and SESB, in particular SESB's agreement to pay directly to Petron, the money which SESB paid into the CIMB project account was actually trust money for the benefit of Petron.

[38] Learned counsel for the appellant referred us to the following passage in F the learned trial judge's grounds of judgment as proof that the learned judge had accepted SDBB's contention that Petron failed to prove that SESB had agreed to make direct payment to Petron:

G ... since the Plaintiff has failed to prove a material fact to support its pleaded case, namely whether SESB had agreed to the (sic) make direct payment to the Plaintiff. This is confirmed by the testimony of Mr Phillix Laimon (PW-2) as appearing at Q&A Nos 16 to 18 of PW2-WS that the fact that there was no such agreement or consent is further fortified.

H **[39]** It was argued that if there never was any agreement by SESB to pay directly to Petron, Petron would have no right whatsoever to stake any claim over the monies which were paid into the CIMB project account by SESB. According to learned counsel, since Petron failed to prove that there was indeed consent or agreement by SESB to make direct payment to Petron, the whole I foundation of Petron's case crumbled.

[40] We reproduce below the whole paragraph of the passage referred to by learned counsel to understand the context in which it was made:

Bear in mind that the 2nd Defendant in his Statement of Defence had denied

Petron's claim and contends that the Assignment of Contract Proceeds ('ACF') of the SESB Contract confirmed that they were entitled for the money paid into the CIMB project account to settle Swakaya's banking facilities with SDB, since the Plaintiff has failed to prove a material fact to support its pleaded case, namely whether SESB had agreed to the (sic) make direct payment to the Plaintiff. This is confirmed by the testimony of Mr. hillix Laimon (PW-2) as appearing at Q&A Nos 16 to 18 of PW2-WS that the fact that there was no such agreement or consent is further fortified.

[41] It is clear that it was made in the context of SDBB's defence to Petron's claim. In any event, what is more important in our view is not whether SESB had agreed to pay directly to Petron. What is important is whether it was conscionable for SDBB to claim the money as its own and to use it for its own benefit when it was meant as payment to Petron for the diesel fuel that it supplied and delivered to SESB.

[42] This brings us to the common law doctrine of constructive trust. For the authorities, we shall first of all refer to *Halsbury's Laws of England* (4th Ed) Vol 48 where at pp 320–321 the following passages can be found:

584. Nature of constructive trust. A constructive trust attaches by law to specific property which is neither expressly subject to any trusts nor subject to a resulting trust but which is held by a person in circumstances where it would be inequitable to allow him to assert full beneficial ownership of the property. Such a person will often hold other property in a fiduciary capacity and it will be by virtue of his ownership of or dealing with that fiduciary property that he acquired the specific property subject to the constructive trust. However, a stranger who receives property in circumstances where he has actual or constructive notice that it is trust property being transferred to him in breach of trust will also be a constructive trustee of that property.

A person who holds property on a constructive trust is a constructive trustee in respect of it. He cannot claim for himself any increase in value of the property or any profits earned by it. If he becomes bankrupt the property is not available for his general creditors but for the beneficiaries in whose favour the constructive trust subsists.

In certain circumstances a person is said to be a constructive trustee in a different sense in that no specific property is subjected to a constructive trust but the person is treated constructively as if he had been a trustee so that, like an express trustee, he can be made personally liable to account to the beneficiaries for any losses or gains resulting from his wrongful activities. Treating him as a constructive trustee is merely a formula for imposing an equitable personal liability to account. If he becomes bankrupt, the trust beneficiaries affected by his wrongful activities have no priority but are treated as ordinary creditors as there is no specific property subjected to a constructive trust.

[43] The position in America is no different as the emphasis is similarly on

equity and good conscience. In *Ferguson v Owen* 9 Ohio St 3d 223 (Ohio 1984); 9 Ohio St 3d 223; 459 NE 2d 1293 this was how the court dealt with the issue of constructive trust:

> A constructive trust is defined in 76 American Jurisprudence 2d (1975) 446, Trusts section 221, as:
>
> > [A] trust by operation of law which arises contrary to intention and *in invitum*, against one who, by fraud, actual or constructive, by duress or abuse of confidence, by commission of wrong, or by any form of unconscionable conduct, artifice, concealment, or questionable means, or who in any way against equity and good conscience, either has obtained or holds the legal right to property which he ought not, in equity and good conscience, hold and enjoy. It is raised by equity to satisfy the demands of justice.

[44] Justice Cardozo spoke in similar vein in *Beatty v Guggenheim Exploration Co* (1919) 225 NY 380; 122 NE 378 at pp 386 and 389 when he said:

> A constructive trust is the formula through which the conscience of equity finds expression. When property has been acquired in such circumstances that the holder of the legal title *may not in good conscience* retain the beneficial interest, equity converts him to a trustee
>
> ... A court of equity in decreeing a constructive trust is bound by no unyielding formula. (Emphasis added.)

[45] This common law principle has been applied in Malaysia in numerous cases, amongst them the following: *Tay Choo Foo @ Tay Chiew Foo v Tengku Mohd Saad @ Tengku Arifaad bin Tengku Mansur & Ors (all acting as administrators of the estate of Tunku Mansur bin Tunku Yaacob, deceased) and another appeal* [2009] 1 MLJ 289; [2009] 2 CLJ 363; *Qimonda Malaysia Sdn Bhd (in liquidation) v Sediabena Sdn Bhd & Anor* [2012] 3 MLJ 422; *Chempro Technology (M) Sdn Bhd v Wee Eng Hock & 2 Ors* (Kuala Lumpur Civil Suit No D1–22–93 of 2008) (unreported); *Takako Sakao (f) v Ng Pek Yuen (f) & Anor* [2009] 6 MLJ 751; *Geh Cheng Hooi & Ors v Equipment Dynamics Sdn Bhd and other appeals* [1991] 1 MLJ 293; *Tudingan Timur Sdn Bhd v Che Mat bin Padali* (Civil Appeal No A-02–1613 of 2011).

[46] In *Tay Choo Foo* Mohd Ghazali Yusoff JCA (as he then was) made the following observations at p 333 (MLJ); p 414 (CLJ):

> [92] A constructive trust is simply a relationship created by equity in the interest of conscience. According to *Snell's Equity* (26th Ed) at p 201, a constructive trust is 'a trust which is imposed by equity in order to satisfy the demands of justice and good conscience, without reference to any express or presumed intention of the parties'. In *The Law of Trusts* by JG Riddal (3rd Ed) at p 359 the learned author's views are as follows:

> The constructive trust is a remedial device that is employed to correct unjust enrichment. It has the effect of taking title to property from one person whose title unjustly enriches him, and transferring it to another who has been unjustly deprived of it ...

[47] In *Takako Sakao*, the facts are these. The appellant Takako Sakao, a Japanese citizen and the first respondent decided to acquire a shop house to operate a restaurant business. The appellant contributed RM194,610 towards the purchase price of the shop house. The property was to be purchased and registered in the joint names of the appellant and the first respondent in equal shares. Instead the first respondent purchased the property for RM950,000 and registered it in her sole name.

[48] The appellant's contention that a trust had arisen in her favour was rejected by the High Court which held that s 433B of the National Land Code barred the appellant from enforcing any trust that may have arisen in her favour by reason of her contribution towards the purchase price of the shop house. Section 433B of the National Land Code requires a foreigner to obtain the prior approval of the State Authority to acquire land.

[49] This court affirmed the High Court decision. Takako Sakao then appealed to the Federal Court and succeeded. It was held, inter alia, by the Federal Court as follows:

(a) a constructive trust arises by operation of law whenever the circumstances are such that it would be unconscionable for the owner of the property (usually not necessarily the legal estate) to assert his own beneficial interest in the property and deny the beneficial interest of another, citing with approval *Paragon Finance plc v D B Thakerar & Co (a firm); Paragon Finance plc and another v Thimbleby & Co (a firm)* [1999] 1 All ER 400;

(b) there was a strong element of unjust enrichment and lack of probity on the part of the first respondent;

(c) it is settled law that trust is an exception to the common law rule of privity of contract. As such the appellant could enforce the trust against both the first and second respondents;

(d) the appellant was entitled to trace her half share of the property into the hands of anyone who acquired it; and

(e) it was not a case in which the appellant deliberately sought to evade complying with s 433B of the Land Code and she was not guilty of such misconduct. Section 433B had no application to the constructive trust imposed upon the first respondent.

[50] On the authorities, it is clear that SSDB had received the said sum of

RM24,835,281.62 from SESB as constructive trustee for the benefit of Petron. Therefore, it was SDBB's duty to return the money to its rightful owner, ie Petron, and not to keep it for itself or to release it to anybody else. It was contrary to good conscience for SDBB to have retained and used the RM24,835,281.62 for its own benefit, notwithstanding the fact that the money had been lawfully and absolutely assigned to it by Swakaya.

[51] Learned counsel for SDBB argued that *Takako Sakao* is distinguishable on the facts. Reference was made to the decision of this court in *Tan Sri Dato' (Dr) Rozali Ismail & Ors v Chua Lay Kim (P) & Ors* [2015] MLJU 2111; [2016] 3 CLJ 84 where this court concluded at p 108 after citing with approval *Re Montagu's Settlement Trusts; Duke of Manchester v National Westminster Bank Ltd and others* [1992] 4 All ER 308 and *Bank of Credit and Commerce International (Overseas) Ltd (in liquidation) and another v Akindele* [2000] 4 All ER 221:

> It is clear from both of these cases that equity imposes a constructive trust and breach of fiduciary duty on the defendants, in cases where it becomes unconscionable for the defendant to continue to retain the benefit of the trust.

[52] It was submitted that based on the factual matrix of the present case, there was 'not even an iota of unconscionable conduct' on the part of SDBB and that SDBB was legally entitled to receive the SESB contract proceeds by reason of the assignment of contract proceeds.

[53] The question whether SDBB had acted unconscionably in retaining the RM24,835,281.62 and utilising it for its own benefit, ie for repayment of Swakaya's loan facilities, is essentially a question of fact. The adjective 'unconscionable' is a derivative of the noun 'conscience' which *The Concise Oxford Dictionary* (9th Ed) defines as follows:

> 1 a moral sense of right and wrong esp. as felt by a person and affecting the behaviour (*my conscience won't allow me to do that*). 2 an inner feeling as to the goodness or otherwise of one's behaviour (*my conscience is clear; has a guilty conscience*).

[54] Guilty conscience is a state of the mind and in the absence of express admission must be judged from a person's outward acts or omissions. In the present case, the whole basis for SDBB's claim that it was entitled to the RM24,835,281.62 was the assignment of contract proceeds.

[55] The reasoning given by SDBB to support its claim that it was entitled to the money is deceptively simple, ie that since the SESB contract proceeds had been lawfully 'given' to SDBB by way of the assignment of contract proceeds, Petron had lost all rights over the money.

[56] The reasoning is structurally flawed as it ignores the simple truth that the RM24,835,281.62 was meant as payment for Petron's sale of the diesel fuel to SESB. It was never meant as repayment for Swakaya's loan with SSDB, or for any other purpose.

[57] In any event, there is no evidence that Petron consented to the money being utilised for reducing Swakaya's RM85m loan with SDBB. What Petron consented to was Swakaya's request for Petron to supply and deliver the diesel directly to SESB, and for SESB to pay directly to Petron.

[58] With due respect, it is stretching the imagination to suggest that Petron had lost all rights over the money merely because Swakaya had assigned the contract proceeds absolutely to SDBB. SDBB's insistence that it was lawfully entitled to the RM24,835,281.62 and retaining it for its own use despite knowing that Petron was the beneficial owner of the money is unconscionable conduct on its part.

[59] There can be no argument that the CIMB project account was opened for the specific purpose of making payment to Petron for the diesel fuel that it supplied and delivered to SESB. In fact, both Swakaya and SESB agreed that the RM24,835,281.62 belonged to Petron. It was therefore unconscionable, we must repeat, for SDBB to claim entitlement to the money by relying solely on the assignment of contract proceeds.

[60] As between Petron and SDBB, clearly the former had better rights over the money for the simple reason that it was payment for the diesel fuel that it had supplied and delivered to SESB. SDBB did not supply and deliver any diesel to SESB. In fact, it was not even in the business of supplying petroleum.

[61] There is evidence to show that SDBB being the sole authorised signatory of the CIMB project account had paid out to Petron part of the payments, namely for the November 2013 deliveries and part of the December 2013 deliveries. We agree with learned counsel for Petron that this is proof that SDBB itself acknowledged that these sums of monies that SESB paid into the CIMB project account rightfully belonged to Petron.

[62] It was for all the reasons aforesaid that we dismissed SDBB's appeal with costs of RM15,000, subject to payment of the allocator fee. The deposit was refunded to the appellant.

A *Appeal dismissed with costs of RM15,000 subject to payment of the allocator fee.*

Reported by Izzat Fauzan

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